

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

ELECTRONIC ENVIRONMENTS CORPORATION,)

Plaintiff

V.

JAMES M. EMMING,

Defendant

**Civil Action No. 05-11093 NG**

**MEMORANDUM OF PLAINTIFF ELECTRONIC ENVIRONMENTS  
CORPORATION CORPORATION INCORPORATION INCORPORATION IN SUPPORT CORE  
TO REQUESTS FOR ADMISSIONS OUT OF TIME**

## Facts

[illegible]

By letter dated September 2, 2005, and received by plaintiff on September 6, 2005, Emming served EEC with a document entitled "Defendant's Motion to Admit, Interrogatories and Requests for Production." (Ex. 1). Because of the way the document was prepared, the requests to admit were not contained in a separate document, but were included in the same document as the interrogatories and requests for production. Plaintiff noticed that the document contained requests to admit, but did not notice that the document contained only defendant's first set of interrogatories and requests for production. Therefore, they were not separately diaried for.

<sup>1</sup>Counsel of EEC and its staff are used to seeing requests for admissions in a separate document entitled Requests for Admissions .

admissions,admissions, which is the practice inadmissions, which is the practice in counsel sadmissions, ofof admissions. (Verified Motionof admissions. (Verified Motion, para. 2).of admissions. (Verified notice that thnotice that thenotice that the document contained requests for admissions until Octo undertakingundertaking to review the docuundertaking to review the documundertaking to review the defendant sdefendant s first setdefendant s first set of interrogatories and requestsdefendant s first set of Motion,Motion, para. 3). EEC absolutely doesMotion, para. 3). EEC absolutely does not admit the request responses.responses. (Verifresponses. (Verified Motionresponses. (Verified Motion, para. 4). On Oc counselcounsel for Emming explained why the requestscounsel for Emming explained why the requests to staff,staff, and staff, and requested that EEC be allowed an extension to serve responses. Counsel f Emming refused. (Verified Motion, para. 5).

### Argument

WhereWhere aWhere a party seeksWhere a party seeksto leave to file untimely responses to request testtest to be applied by the court is whether permitting the ptest to be applied by the court is whether presentationpresentation of the merits of thepresentation of the merits of the action, and whetherprejudiceparty.party. party. *Ameribanc Savings Bank FSB**Ameribanc Savings Bank FSB et. al v. Resolution Trust Co* 581 (E.D. Va. 1994).

InIn *Ameribanc*, counsel representing the, counsel representing the part, counsel representing the inadvertentlyinadvertently placed the requestsinadvertently placed the requests in theinadvertently placed the failurefailure to answer the requests for admissions until May. failure to answer the requests for admission

The rule emphasizes the importance of having each action resolved on its merits, while at the same time assuring each party that its justified reliance upon admissions in preparation. *Id.*, citing *Branch Banking & Trust Co. v. Deutz-Allis Corp*, 120 F.R.D. 655, 658 (E.D.N.C.1988).

The court concluded that relief from the The court bebecausebecause the defendants were not prejudiced in that they could not have expected the propounded requests for admission requests for admissions to requests for admissions to be admitted prejudiced by its counsel s actions in misplacing the discovery documents. *Id.*

Here, Here, as in *Ameribanc*, defendant Emming could not have expected EEC to admit the requests for admissions. In particular, admission requests for admissions. In particular, admission requests for admissions. EEC's case against Emming because it seeks an admission that EEC's Confidentiality Agreement is not Confidentiality Agreement is not Confidentiality Agreement is not prejudiced by allowing EEC to respond to the admissions.

On the other hand, EEC would suffer the ultimate prejudice if EEC, solely because of the action of EEC's counsel, soE, solely because of the action of EEC's counsel, so mistake by its counsel in this case is even more understandable than that in *Ameribanc*, because here the defendant contributed to the mistake by the unorthodox way because here the defendant presented its requests for admissions to EEC. The requests were not in presented its requests for admissions in the form of a Request for Admissions. The requests were in the form of Requests to Admit, Interrogatories And Request for Production of Documents Requests to Admit, Interrogatories And Request for Production of Documents. Therefore, neither counsel, Leo S. McNamara, Esq., nor Therefore, neither counsel, Leo S. McNamara, Esq., nor the complaint contained requests for admissions, and neither undertook contained requests for admissions, and neither the complaint nor the response, the usual practice in counsel's offices. Instead, counsel response, the usual practice in counsel's offices. Instead, counsel's response to the requests for admissions until requests for admissions until some time after what he thought to be defendant's first set of interrogatories and requests for production.

FinallFinally,Finally, RFinally, Rule 36 relating to request for admissions was not intended to b

<sup>2</sup>Rule 36 is entitled Requests For Admissions not Requests to Admit .

cover the entire case , or to cover the entire case , or to cover a controverted legal issue cover the  
*Pittsburgh Hotels Association, Inc. v. Pittsburgh Hotels Association, Inc. v. Urban Pittsburgh Hotels Association, Inc.*  
 512, 513 (W.D. Pa. 1965); 512, 513 (W.D. Pa. 1962). The rule was designed to obtain a ruling where  
 there is no real dispute, *Fuhr v. Newfoundland -St. Lawrence* 512, 513 (W.D. Pa. 1962). The rule was designed to obtain a ruling where  
*F.R.D. 9, 12 (S.D.N.Y., 1959)*. That is one reason why Rule 36 (b) specifically allows for a  
 withdrawal or amendment to responses to requests for discovery. Here, Emming's requests, if admitted, would run completely counter to the  
 allegations of EEC's Verified Complaint. And *via* Request No. 3. Request No. 3. Request No. 3. Request No. 3.  
 admissions seek to cover the entire case .

### Conclusion

For all of the above reasons, plaintiff's request that its motion be allowed.

ELECTRONIC ENVIRONMENTS  
 CORPORATION  
 By its Attorney,

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 /s/ Leo S. McNamara  
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Dated: October 21, 2005